

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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PHILLIP MORENO,

Plaintiff,

v.

WILLIAM GITTERE, *et al.*,

Defendants.

Case No. 3:20-CV-00013-RCJ-CLB

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹**

[ECF Nos. 29, 34]

This case is a *pro se* prisoner civil rights action filed by Plaintiff Phillip Moreno ("Moreno") against Defendant Maria Blanco's ("Blanco"). Moreno is an inmate in the custody of the Nevada Department of Corrections ("NDOC"), asserting claims arising under 42 U.S.C. § 1983. (ECF No. 9.) Moreno is proceeding on a single claim for alleged excessive force under the Eighth Amendment against Blanco.

Currently pending before the Court is Blanco's motion for summary judgment, (ECF No. 29). Blanco's motion argues, in pertinent part, that Moreno's case should be dismissed based on a failure to exhaust his administrative remedies pursuant to the Prison Litigation Reform Act ("PLRA"). (*Id.*) In response, Moreno filed a motion to dismiss, wherein he acknowledges that he failed to exhaust his administrative remedies as required by the PLRA. (ECF No. 34.) Moreno requests the Court grant his motion to dismiss his complaint, without prejudice, based on his failure to fully exhaust. (*Id.*)

The PLRA states that prisoners must exhaust available administrative remedies before filing § 1983 actions in federal court. See 42 U.S.C. § 1997e(a). Prisoners must exhaust their administrative remedies prior to filing suit, not during the pendency of the suit. See *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam) (requiring

¹ This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 dismissal without prejudice where a prisoner “d[oes] not exhaust his administrative
2 remedies prior to filing suit but is in the process of doing so when a motion to dismiss is
3 filed.”). Accordingly, the Court recommends that Moreno’s motion to dismiss without
4 prejudice (ECF No. 34), be granted and Blanco’s motion for summary judgment (ECF No.
5 29), be denied as moot.

6 **I. RECOMMENDATION**

7 **IT IS THEREFORE RECOMMENDED** that Moreno’s motion to dismiss without
8 prejudice (ECF No. 34), be **GRANTED** and Blanco’s motion for summary judgment (ECF
9 No. 29), be **DENIED AS MOOT**.

10 The parties are advised:

11 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
12 Practice, the parties may file specific written objections to this Report and
13 Recommendation within fourteen days of receipt. These objections should be entitled
14 “Objections to Magistrate Judge’s Report and Recommendation” and should be
15 accompanied by points and authorities for consideration by the District Court.

16 2. This Report and Recommendation is not an appealable order and any
17 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
18 District Court’s judgment.

19 **DATED:** June 7, 2022

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22 **UNITED STATES MAGISTRATE JUDGE**
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